LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 29 1968
JOHN F. DAVIS, CLERK

# In The Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR COMPANY, *Respondent*

## BRIEF FOR RESPONDENT

CLAUDE R. BRANCH,
*Attorney for Respondent,*
30 State Street,
Boston, Mass.

*Of Counsel:*

WRIGHT TISDALE,
RICHARD B. DARRAGH,
HARVEY S. KRONFELD,
THAYER FREMONT-SMITH.

April, 1968

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Counterstatement of the question presented | 2 |
| Counterstatement of the case | 2 |
| Argument | 7 |
| A. The petition should be denied because both of the courts below correctly found that petitioners have shown no danger of immediate irreparable injury. | 7 |
| B. The holding below is not in conflict with the decision or any other court of appeals. | 11 |
| C. There are other independent grounds supporting the order below. | 16 |
| 1. The requested injunction would be mandatory in character. | 16 |
| 2. Defendant would be injured materially if the requested injunction were granted. | 17 |
| D. The decision below, affirming the interlocutory and discretionary order denying the requested preliminary injunction, does not merit review by this Court. | 19 |
| Conclusion | 20 |
| Appendix | A-1 |

## CITATIONS

CASES:


| | PAGE |
|---|---|
| Allen v. Trust Company of Georgia, 326 U.S. 630 (1946) | 10 |
| American Construction Co. v. Jacksonvillee, T. & K. R. Co., 148 U.S. 372 (1893) | 19 |
| Automatic Radio Mfg. Co. v. Ford Motor Co., 242 F. Supp. 852 (D. Mass. 1965) | 1, 6, A3, A8, A9 |
| Automatic Radio Mfg. Co. v. Ford Motor Co., 272 F. Supp. 744 (D. Mass. 1967) | 1, 4, 5, A3, A7, A8, A9 |
| Bateman v. Ford Motor Co., 302 F. 2d 63 (3rd Cir. 1962) | 11, 13 |
| Bergen Drug Co. v. Parke, Davis & Co., 307 F. 2d 725 (3rd Cir. 1962) | 11, 12 |
| Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union, 292 F. 2d 61 (2d Cir. 1961) | 15 |
| Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948) | 9 |
| Foundry Services, Inc. v. Beneflux Corp., 206 F. 2d 214 (2nd Cir. 1953) | 7 |
| Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) | 10 |
| Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) | 19 |
| Hamilton Watch Co. v. Benrus Watch Co., 114 Supp. 307 (D. Conn. 1953) | 14 |
| Hamilton Watch Co. v. Benrus Watch Co., 206 F. 2d 738 (2d Cir. 1953) | 11, 13, 14 |

PAGE

Hutchinson v. American Oil Products, 221 F. Supp. 728 (E.D. Pa. 1963) ..... 12

Imperial Chemical Industries, Ltd. v. National Distillers & Chemical Corp., 354 F. 2d 459 (2d Cir. 1965) ..... 15

Joseph Bancroft & Sons Co. v. Shelley Knitting Mills, Inc., 268 F. 2d 569 (3d Cir. 1959) ..... 16

Miami Beach Federal Savings and Loan Ass'n v. Callander, 256 F. 2d 410 (5th Cir. 1958) ..... 16

Public Service Commission of Wisconsin v. Wisconsin Telephone Co., 289 U.S. 67 (1933) ..... 19

United States v. Johnston, 268 U.S. 220 (1925) ..... 10

W. E. Bassett Company v. Revlon, Inc., 354 F. 2d 868 (2d Cir. 1966) ..... 15

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 19

STATUTES:

Clayton Act, 38 State 730, 15 U.S.C.: Section 16, 15 U.S.C. 26 7

Automobile Dealer Franchise Act, 70 Stat. 1125; 15 U.S.C. 1221-1225 ..... 13

MISCELLANEOUS:

43 C.J.S., Injunctions, pp. 412-413 ..... 16

# In The Supreme Court of the United States

OCTOBER TERM, 1967

No. 1279

AUTOMATIC RADIO MFG. CO., INC., and
AUTOMATIC RADIO SALES, INC., *Petitioners*

v.

FORD MOTOR COMPANY, *Respondent*

## *BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.*

### OPINIONS BELOW

In addition to the unreported opinion of the Court of Appeals copied in the Petition, Appendix B, pp. 14a-20a, the Court may wish to consider the opinion of Judge Garrity in the District Court at 272 F. Supp. 744, denying the motion for preliminary injunction here involved. (A copy of that opinion is printed pp. 4a-13a of Appendix B to Petition, at the bottom of which is incorrectly inserted the name "Andrew A. Caffrey, *United States District Judge*"). The Court may also wish to consider the opinion of Judge Caffrey of the District Court on an earlier motion of petitioners for preliminary injunction reported at 242 F. Supp. 852 (a copy of which is printed in PPRA 43-54).*

*These letters refer to plaintiffs' printed record appendix in the court below. Other abbreviations used in this brief are the following: DPRA for defendant's printed record appendix; PXRA for plaintiffs' xeroxed record appendix; DXRA for defendant's xeroxed record appendix.

## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should grant certiorari to review the interlocutory order of the Court of Appeals which affirmed the denial by the District Court of a motion for a mandatory preliminary injunction on the ground, found by both courts, that plaintiffs* (petitioners here) had not shown, on the particular facts, that defendant's* practice had caused irreparable damage to them or threatened immediately to do so, and which denial properly could have been affirmed on other grounds.

## COUNTERSTATEMENT OF THE CASE

In view of the fact that both courts below have concurred in the findings of fact on which the case turns and in light of the various grounds, hereafter stated, on which the preliminary injunction should be denied, it is unnecessary to correct all of the erroneous impressions of the facts in this record created by the Petition. There are, however, several statements in it which ought not to go unchallenged. They are discussed briefly in the appendix to this brief.

Before the 1965 model year, the openings for the radio in the instrument panels of defendant's cars, when delivered without a radio, were covered by a metal or plastic cover plate which plantiffs have referred to as a "knockout plate". (Affidavit of Oakes, para. 6, DXRA 56.)

When defendant's 1965 through 1967 Ford and Fairlane and 1967 Mercury and Comet DeLuxe cars were delivered without radios, the openings for the radios in their instrument panels were covered by a somewhat larger ornamental piece called a "finish panel" or a "lens" and "mask".

---

*Throughout this brief we usually refer to petitioners here as "plaintiffs" as they were plaintiffs in the District Court and are referred to as such in opinions from which we quote. Similarly respondent here is usually referred to as "defendant".

(DPRA 106; affidavit of Woods, paras. 9, 21, 24, DPRA 209, 214, 215; affidavit of Oakes, para. 6, DXRA 56-57.)

Plaintiffs complain because when a radio is installed at a dealership in a 1965 through 1967 Ford or Fairlane or in a 1967 Mercury or Comet DeLuxe, it is necessary to remove the imperforate ornamental piece covering the opening for the radio and, to complete defendant's design of the instrument panel cluster, it is necessary to install a perforated ornamental piece. (DXRA 106-107.)

By their motion for a preliminary injunction plaintiffs seek to compel defendant to supply its dealers with cars without radios with perforated plastic or metal masks and lenses or finish panels, factory-installed, i.e. with uncovered holes in parts attached to the instrument panels.* Neither defendant, nor any other car manufacturer, has ever sold or offered for sale any car in such unfinished condition upon request of a dealer. Cars in such a condition are not finished products suitable for sale because they would have instrument panels with gaping and unsightly radio openings through which unsightly, unsafe and distracting instrument panel lights would shine at night and through which wiring, bracketry, and heater and air conditioning components could be seen. (DPRA 107,110; affidavit of Oakes, paras. 17-18, DXRA 62-63.)

Other car manufacturers have always covered the openings for a radio in the instrument panels of their cars before selling them to dealers or other customers. (Affidavit of Woods, paragraph 27, DPRA 216.)

Defendant has never refused to deliver such unfinished products to its dealers; it has never been asked to do this. Neither Ford Division nor Lincoln-Mercury Division of defendant has ever received even an inquiry as to the avail-

---

*The Petition and the courts below sometimes refer to the instrument panel as "dashboard."

ability or price of any of its cars with a factory-installed perforated finish panel, mask or lens, without a radio, although requests by dealers for special equipment are not uncommon. (Affidavit of Bara, paras. 6-7, DPRA 112; opinion of Judge Garrity, Petition, Appendix B, p. 12a.)

The Petition refers to defendant's "overt tied selling" of custom radios and cars.

At the outset it should be pointed out that defendant does not tie the sale of its radios to sales of its cars. "It is undisputed that the defendant sells automobiles without radios and radios without automobiles". (Opinion of Judge Garrity, Petition, Appendix B, p. 10a.)

Over the years defendant has sold and continues to sell radio kits without cars to its dealers to enable them to install radios in the instrument panels of its cars, including the models involved in this motion. Defendant's dealers are and have been free to purchase cars from defendant, without a radio, and radio kits for these cars, without the cars, as they desire. (DPRA 110; affidavit of Redd, para. 3, DPRA 136; affidavits of Ford and Mercury dealers named in plaintiffs' answers to interrogatories, DPRA 62-105 and 148-205.)

The Petition also states (p. 4) that the preliminary injunction is sought "to preserve the status quo".

The granting of the injunction sought would not "maintain the status quo", as neither defendant nor any other automobile manufacturer has ever delivered cars in the unfinished condition in which plaintiffs seek to require defendant to deliver them. (Woods' affidavit, para. 27, DPRA 216.) The injunction sought would be mandatory in substance and effect, because it would require defendant to do something which it never has done, i.e. supply cars in an unfinished condition and change its marketing practice and ordering system so as to provide an option whereby dealers

could use and obtain unfinished automobiles with perforated pieces installed in them. (Opinion of Judge Garrity, Petition, Appendix B, p. 13a.)

The overriding significant fact is that both courts concluded that plaintiffs failed to show any irreparable loss or damage caused by defendant's practice of which they complain.

Judge Garrity's opinion denying the motion under consideration concluded (Petition, Appendix B, p. 13a):

> "... the plaintiffs have not established by evidence offered on the pending motion . . . that the defendant's practice has caused irreparable damage to the plaintiffs or threatens immediately to do so . . ."

The opinion also contains the following (Petition, Appendix B, pp. 10a-12a):

> "On the issue whether the plaintiffs have shown 'that the danger of irreparable loss or damage is immediate,' 15 U.S.C. § 26, the plaintiffs have presented an anomalous case. They have shown greater losses on sales to defendant's dealers than had been incurred at the time of the 1965 hearing, but presented virtually no proof to connect these losses with conduct of the defendant. . . .It would serve no purpose to duplicate the detailed findings contained in Judge Caffrey's opinion. Suffice it to say that in every particular they were corroborated by voluminous evidence of events since 1965. The court finds that plaintiffs have thus far failed to establish a causal relationship between the dashboard change and plaintiffs' declining sales. The court finds that the chief reason for the decline is probably the current shortage of trained mechanics and service stalls and dealers' consequent preference for factory-installed equipment.
>
> "On the same issue of irreparable and immediate damage, the over-all business of the plaintiffs is prospering. While

they have lost some distributors during the past two years, they have replaced them and added new ones so that the total number of their distributors has increased."

The motion before the Court (served on February 17, 1967, and denied on September 20, 1967) is similar to the motion for a preliminary injunction which was served on September 25, 1964. This motion was denied by Judge Caffrey on June 28, 1965, after a two day hearing at which both sides introduced testimony of witnesses who were subjected to cross-examination, as well as affidavits.

His opinion contained the following conclusions (PPRA 51):

"I am not satisfied that plaintiffs have shown that Ford made the changes complained of for the purpose of aiding its own sales of factory-installed radios or to injure the business of plaintiffs and others similarly situated, nor that Ford's 1965 design changes substantially or unreasonably increased installation time in any event.

"Plaintiffs have also failed to prove that by reason of the conduct that has occurred thus far they have suffered anything remotely approaching irreparable damage. Their protestations have been loud and long and their proof soft and short. They have not clearly shown what financial changes they have suffered since the beginning of the 1965 car season. They have not shown that whatever these consequences may be they are proximately caused by any wrongful conduct of defendant. They have not shown what, if any, effect the conduct complained of has had on their employee situation, and they admit that they have not lost any one of their fifty distributors."

The opinion of the Court of Appeals, affirming Judge Garrity's denial of the preliminary injunction, states "We dispose of this appeal on the narrow ground that Automatic

has made no compelling case of immediate irreparable injury". (Petition, Appendix B, p. 18a.)

On pp. 8-9, *infra* we demonstrate that these findings are amply supported by evidence.

## ARGUMENT

### A.

### The Petition Should Be Denied Because Both Of The Courts Below Correctly Found That Petitioners Have Shown No Danger Of Immediate Irreparable Injury.

Section 16 of the Clayton Act (15 U.S.C. §26) provides for injunctive relief in antitrust cases

> " . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: . . ."

It is, of course, fundamental that to obtain a preliminary injunction the moving party must sustain the burden of showing that it will suffer irreparable and immediate damage for which it cannot be adequately compensated unless a preliminary injunction is granted and that a showing of loss of sales is not sufficient to meet the burden. See, for example, *Foundry Services, Inc.* v. *Beneflux Corp.*, 206 F. 2d 214 (2nd Cir. 1953).

The findings of the District Court and the Court of Appeals are well supported by the evidence.

In fact, plaintiffs have not shown that there has even been any substantial loss of sales which can be attributed to the instrument panel changes.

In 1965, plaintiffs named 15 Ford dealers who they claimed had refused or declined to purchase their radios on account of instrument panel changes. Of these only two stated that the panel changes had influenced their purchases of plaintiffs' radios, and in each of these cases it appeared that, had the dealer realized how little time was required to install radios in the 1965 Ford and Fairlane, he probably would have bought radios from someone to install himself. (DPRA 80, 84.)

In March, 1967, plaintiffs listed 25 Ford and Mercury dealers who they claimed had refused or declined to purchase their radios on account of the panel changes complained of. All except one denied that he refused or declined to purchase plaintiffs' radios on account of the instrument panel changes. (DPRA 148, 150, 153, 156, 161, 163, 168, 172, 174, 176, 177, 179, 180, 183, 185, 187, 189-190, 193, 195, 198, 199, 200-201, 202, 204.) That one said that the instrument panel change was a "minor factor" in the decrease in the number of Automatic radios purchased by his dealership for Fords and Fairlanes. (DPRA 203.)

As for plaintiffs' alleged losses, their losses in the manufacture and sale of their radios for the Mercury and Comet lines have actually decreased since the panel changes occurred in those cars, as is revealed by consolidating the "profit on sales" figures of Automatic Radio Sales, Inc. on these lines with the "loss on Ford operations" figures given for the manufacturing company. (Compare DPRA 123 and DPRA 127 combined, and DPRA 125 and DPRA 129 combined, with DPRA 130; and compare DPRA 125 and

DPRA 129 combined with DPRA 126 and DPRA 130 combined.*)

Although plaintiffs' sales of radios for the cars in which the instrument panels have been changed have decreased, this is true also of sales of radios for Ford-built cars in which there have been no changes in the instrument panels. (DPRA 117.) There has been a similar decrease in plaintiffs' sales of radios for cars of other manufacturers. (DXRA 120, 122.)*

Consideration of the evidence just referred to demonstrates that the Court was correct in finding "that plaintiffs have thus far failed to establish a causal relationship between dashboard changes and plaintiffs' declining sales" (Petition, Appendix B, p. 11a) and that the same is true of their alleged losses.

As pointed out above, both the courts below found as a fact that plaintiffs had not shown immediate irreparable injury. This case consequently presents a situation like those in which this Court has stated and applied the principle that it will not reverse findings of fact made by two courts below, in the absence of very exceptional showing of error. Thus in *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948), the Court said (p. 214):

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Stuart* v. *Hayden*, 169 U.S. 1; *Brainard* v. *Buck*, 184 U.S. 99; *First National Bank* v. *Littlefield*, 226 U.S. 110; *Baker* v. *Schofield*, 243 U.S. 114; *Second Russian Insurance Co.* v. *Miller*, 268 U.S. 552; *Texas & N. O. R. Co.* v. *Brotherhood of Clerks*, 281 U.S. 548; *Page* v. *Arkansas Natural Gas Corp.*, 286 U.S. 269; *Pick Mfg. Co.* v. *General Motors Corp.*, 299

*These figures are analyzed in detail in Appendix, pp. A-4–A-6, *infra*.

U.S. 3; *Virginian R. Co.* v. *System Federation,* 300 U.S. 515; *United States* v. *O'Donnell,* 303 U.S. 501; *Anderson* v. *Abbott,* 321 U.S. 349; *Allen* v. *Trust Co.,* 326 U.S. 630; *United States* v. *Dickinson,* 331 U.S. 745. . . ."

In *Allen* v. *Trust Company of Georgia,* 326 U.S. 630, 636 (1946), the Court said of findings of the two courts below,

"Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence. See *United States* v. *O'Donnell,* 303 U.S. 501, 508 and cases cited."

This Court said in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925):

"We do not grant a certiorari to review evidence and discuss specific facts."

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949), this Court said:

"A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. . . ."

See also: *Virginia Airmotive, Ltd.* v. *Canair Corp.,* 5 Trade Reg. Rep. §72, 407 (4th Cir. 1968).

Here it would be an understatement to say that the findings are not clearly wrong. In view of the evidence referred to above and on pp. A-3-A-6, *infra* it is obvious that they were clearly right.

B.

THE HOLDING BELOW IS NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The Petition asserts in effect that the decision of the Court below applies criteria which conflict with those applied by the Court of Appeals for the Third Circuit in *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (1962), and in *Bateman* v. *Ford Motor Co.*, 302 F. 2d 63 (1962), and by the Court of Appeals for the Second Circuit in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F. 2d 738 (1953).

Neither the decision of the Court of Appeals in the case at bar nor the criterion applied by it is in conflict with any of these cases. None of those cases held that an appellate court should reverse a judgment denying a preliminary injunction based upon a finding that plaintiff had failed to prove that there was danger of immediate irreparable injury.

In the *Bergen* case, *supra*, the Court of Appeals held that a preliminary injunction should be granted because, *inter alia*, plaintiff was a "full-line, full-service wholesaler", many of defendant's products were "not otherwise available", and were indispensable to the operation of the businesses of plaintiff's customers, who were retail pharmacists, and who would shift their purchases to another wholesaler able to meet all their needs in one order if plaintiff could not supply them.

No such situation is presented in the case at bar. Plaintiffs are not dependent in any way upon defendant as a supplier. Plaintiffs here manufacture their own radios, and it does not appear that they ever obtained any radios or radio parts from defendant. It does not appear, and it is not a fact, that plaintiffs were full-line, full-service wholesalers. As the Court of Appeals properly found, dealers

decide whether to buy radios from plaintiffs' distributors largely on the basis of price. (Appendix B to Petition, p. 19a.) Moreover, it does not appear that plaintiffs' failure to manufacture and sell radios for certain models has impaired their sales of radios for car models which they do make. Furthermore, neither plaintiffs' nor defendant's radios are indispensable to the operation of a car dealership. There is no finding and, we submit, no evidence to support a finding that defendant's practices which are complained of were instituted "by a feeling of resentment" or to stifle the main action, or to achieve a monopoly, as was found in regard to defendant's conduct in the *Bergen* case.

Other elements relied upon in the *Bergen* case are also absent here. As the Court of Appeals in our case said, in distinguishing the *Bergen* case (Appendix B to Petition, p. 19a):

> ". . . Automatic's immediate customers are distributors who sell to dealers, who, in turn, seek Automatic's product because it is a lower cost product, yielding them a greater profit. This is not the situation faced in cases like *Bergen Drug Co.* v. *Parke, Davis & Co.*, 307 F. 2d 725 (3d Cir. 1962) or *McKesson & Robbins, Inc.* v. *Charles Pfizer & Co.*, 235 F. Supp. 743 (E. D. Pa. 1964), where inability to supply 'a full line' of products causes the purchaser to shift his business permanently to other suppliers. Here all non-Ford suppliers are treated alike."

The *Bergen* case was also distinguished in *Hutchinson* v. *American Oil Products*, 221 F. Supp. 728 (E. D. Pa. 1963), on the ground, *inter alia*, that there was no showing in that case that plaintiff could not obtain all of his requirements from suppliers other than the defendant. In denying plaintiff's motion for a preliminary injunction, the court there stated (p. 732):

> "The heavy burden resting upon a plaintiff in establishing the right to a preliminary injunction has been frequently

emphasized by the United States Court of Appeals for the Third Circuit. See Madison Square Garden Corp. v. Braddock, 90 F. 2d 924 (1937); Joseph Bancroft & Sons Co. v. Shelley Knitting Mills Co., 268 F. 2d 569 (3rd Cir. 1959). In the Madison Square Garden Corp. case, supra, the court said 90 F. 2d at page 927:

> 'It has been well stated that upon an application for a preliminary injunction to doubt is to deny'."

The *Bateman* case cited in the Petition holds merely that a judgment for damages is not the exclusive remedy under the Automobile Dealer Franchise Act and that a District Court has jurisdiction in equity to enjoin a defendant from cancelling a franchise agreement in bad faith in violation of that Act. There the Court of Appeals did not hold that an injunction should be granted, but simply remanded the case for further proceedings in view of the fact that the District Court denied a preliminary injunction on the ground that the statutory right to damages was exclusive.

The facts in the *Hamilton* case, *supra*, were entirely different from those in the case at bar. The Court of Appeals in that case said of the findings of the court below "we cannot possibly declare them 'clearly erroneous', we must therefore accept them on this appeal". (206 F. 2d at p. 740.) The ultimate holding in that case was simply that the District Judge in granting a motion for a preliminary injunction "surely did not 'abuse' his discretion". (206 F. 2d at p. 743.) The District Judge enjoined defendant from voting stock of a competitor which it had acquired, finding that the purchase of the stock "very probably" violated §7 of the Clayton Act. (206 F. 2d at p. 740.) There is no finding in the case at bar that Ford's practices have violated any provision of the antitrust laws.

The petition relies upon the following language of Judge Frank in the *Hamilton* case:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." (206 F. 2d at p. 740.)

The Second Circuit in the *Hamilton* case did not hold that it was unnecessary for plaintiff to show "that the danger of irreparable loss or damage is immediate." Indeed the District Court found (114 F. Supp. at p. 314) that "Hamilton will be irreparably damaged" if a preliminary injunction were not granted.

The Court of Appeals and the District Court in our case did not rule that plaintiffs' right to a final decision, after a trial, "be absolutely certain, wholly without doubt" in order for a preliminary injunction to issue. Indeed, as the Court of Appeals made clear in its opinion, it disposed of "this appeal on the narrow ground that Automatic has made no compelling case of immediate irreparable injury." (Petition, Appendix B, p. 18a.)

It is noteworthy that later decisions of the Court of Appeals for the Second Circuit laid down and applied the following principles:

> "A preliminary injunction is an extraordinary equitable remedy and it will be granted only upon a showing by the applicant that it will probably succeed on the trial and that it will suffer irreparable injury if the defendant is not restrained from certain activity pending the

trial. . . . " *Imperial Chemical Industries, Ltd.* v. *National Distillers & Chemical Corp.*, 354 F. 2d 459, 461-462 (1965).

In *W. E. Bassett Company* v. *Revlon, Inc.*, 354 F. 2d 868 (1966), the Court of Appeals for the Second Circuit applied the established principle that a preliminary injunction may not issue without a showing of probable success after trial and immediate and irreparable injury. It stated at pages 871 and 872 of the opinion:

> "A critical factor in the granting of such an injunction against an alleged trademark infringer is whether it is reasonably probable that the plaintiff will prevail after trial.
>
> * * *
>
> "Having established the likelihood of eventual success on the merits of its infringement suit, Bassett must also show that the denial of a preliminary injunction would cause it irreparable injury. See Foundry Services, Inc. v. Beneflux Corp., 206 F. 2d 214 (2 Cir. 1953)."

See also *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 70 (2d Cir. 1961), in which the Court said of the language of Judge Frank in the *Hamilton* case quoted above:

> ". . . the language quoted from Judge Frank's opinion must be taken along with the beginning of the sentence, 'To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt,' and the statement that the Court could not 'possibly' declare the District Court's substantive findings of probable Clayton Act violation to have been clearly erroneous."

There is thus no conflict presented here.

C.

THERE ARE OTHER INDEPENDENT GROUNDS SUPPORTING THE ORDER BELOW.

Apart from the findings of both courts below that plaintiffs failed to show danger of immediate irreparable injury, there are other independent grounds which require denial of the injunction sought by plaintiffs.

**1. The requested injunction would be mandatory in character.**

As we have shown above, the injunction sought would be mandatory, not only because it would require defendant to change its forms for orders but also because it would require defendant to do what neither it nor any other automobile manufacturer has ever done — supply automobiles in an unfinished condition (pp. 3-4 *supra*). We point out below the damage to defendant which such a practice would entail.

It is well settled that, as is stated by the Court of Appeals for the Fifth Circuit in *Miami Beach Federal Savings and Loan Ass'n.* v. *Callander,* 256 F. 2d 410, 415 (1958):

> "A mandatory injunction of this nature, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party."

See also *Joseph Bancroft & Sons Co.* v. *Shelley Knitting Mills, Inc.,* 268 F. 2d 569, 574 (3rd Cir. 1959), and 43 C.J.S., *Injunctions,* pp. 412-413.

The case at bar is not a rare instance "in which the facts and law are clearly in favor of the moving party." On the contrary, there is no basis in fact or law for granting a mandatory preliminary injunction.

**2. Defendant would be injured materially if the requested injunction were granted.**

If the requested injunction were granted, defendant would be required on a dealer's request to deliver Ford, Fairlane and Comet cars with uncovered openings in the instrument panels.

The appearance of passenger cars, both interior and exterior, vitally affects their salability. As the instrument panel is so prominent its appearance is particularly important. (DPRA 110.)

If the requested preliminary injunction were granted, defendant would be placed at a competitive disadvantage with other manufacturers in the marketing of its Ford, Fairlane, Mercury and Comet cars without radios. This is because the requested injunction would compel defendant to sell such cars in an unfinished condition with instrument panels having large and unsightly radio openings in them through which unsafe, unsightly and distracting instrument panel lights would shine at night and through which wiring, bracketry and heater and air conditioning components would be seen. (DPRA 107-110; DXRA 62-63.)

In an actual test of such a car in the dark room of defendant's Technical Service Laboratory in Michigan, distracting and unsightly light leakage was observed from the instrument cluster, ash tray, heater and air conditioning controls on the 1967 Mercury; from the instrument cluster and the ash tray in a partially or fully opened position in the Comet; from the instrument cluster, clock and heater controls in the 1967 Ford; and from the instrument cluster and the heater controls in the 1967 Fairlane. (Affidavit of Oakes, para. 17, DXRA 62-63.)

Nor would an order that defendant must deliver cars in such a condition to dealers only "upon request" solve the

problem. It is and has been customary for many of defendant's dealers to order substantial quantities of cars from defendant from time to time during each model year for their inventories, i.e. without having orders from their customers for these cars, and without knowing whether the cars would be sold with a radio or without a radio. (Affidavit of Redd, para. 3, DPRA 136.) Thus there would be no way of being certain that some dealers might not over-estimate their anticipated demand for cars with radios, be left with an inventory of cars with perforated finished panels factory-installed without radios, and offer them to customers in this unsightly and unsafe condition. (See affidavits of defendant's dealers McCarthy, DPRA 167, and Halpert, para. 5, DPRA 196, regarding the difficulty of accurately estimating, at the time of ordering cars, the number of cars that will be sold with radios.)

## D.

### The Decision Below, Affirming The Interlocutory And Discretionary Order Denying The Requested Preliminary Injunction, Does Not Merit Review By This Court.

The decision below turns solely upon an analysis of the particular facts which led the Court of Appeals to "dispose of this appeal on the narrow ground that Automatic has made no compelling case of immediate irreparable injury" (Appendix B to Petition, p. 18a).

In *American Construction Co.* v. *Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384, (1893) the Court said:

> "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

In *Hamilton-Brown Shoe Co.*, v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), the Court said that lack of finality "of itself furnished sufficient ground for denial." Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952).

This Court said in *Public Service Commission of Wisconsin et al.* v. *Wisconsin Telephone Co.*, 289 U.S. 67, 70 (1933),

> ". . . While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. That discretion can be exercised only upon a determination, in the light of the issues and of the facts presented, whether the complainant has made, or has failed to make, such a showing of the gravity of his complaint as to warrant interlocutory relief. . . ."

This case clearly does not present a question of Federal Law of general importance and applicability which warrants review by this Court. Unlike some others, it involves plaintiffs which "do not have a consumer-oriented enterprise in the sense that its sales depended upon consumer consciousness of its product's availability or non-availability". (Opinion of Court of Appeals, Appendix B to Petition, p. 19a.) Indeed, as found by the District Court, these are plaintiffs which "appear to make every effort to supply dealers with radios as indistinguishable in appearance as possible from those manufactured by defendant, with the result that a radio made by the plaintiffs may be installed at the same retail price without the consumer knowing or having any reason to inquire by whom it was manufactured." (Appendix B to Petition, p. 8a., footnote 2.)

## CONCLUSION

The decision below was correct and there is no conflict between it and decisions of other Courts of Appeals. The case depends upon its particular facts, on which both courts below agreed. It involves an interlocutory order and a matter for the exercise of the District Court's discretion. No question of law of general importance and applicability is presented. Accordingly, the Petition for writ of certiorai should be denied.

Respectfully submitted,

CLAUDE R. BRANCH,
*Attorney for respondent.*

*Of Counsel:*

WRIGHT TISDALE,
RICHARD B. DARRAGH,
HARVEY S. KRONFELD,
THAYER FREMONT-SMITH.

April, 1968.

# APPENDIX

In view of what we have said on the preceeding pages, it is probably unnecessary to correct misapprehensions which may arise from reading the Petition. There are, however, several statements in it which ought not to go unchallenged.

In the Petition (pp. 6 and 7) is the following:

"For the immediate purposes of the present appeal, the sales practices in question are exemplified by Ford's marketing of its 1967 Galaxie, Fairlane, Deluxe Comet and Mercury models. Each of these models is offered to Ford dealers in two versions: one with an imperforate dashboard that will not accomodate a custom radio and the other with a dashboard designed and adapted to accomodate a custom radio. The version that will accommodate a custom radio is available to Ford dealers only when they buy a factory-installed radio from Ford. To remain in competition with Ford, petitioners have been obliged to have radio dashboards manufactured for them, so that they can be furnished free of charge to Ford dealers who buy petitioners' custom radios. Petitioners have not been able to obtain these dashboards, which are costly, in the first quarter of the Galaxie and Fairlane model years, nor indeed at all for the Mercury or Custom Comet models. Thus as a result of Ford's tied marketing practices they have been wholly debarred from the Mercury and Custom Comet markets, debarred from an important part of the sales season for the Galaxie and Fairlane markets, and subjected to enhanced costs which haye caused their dwindling sales of Galaxie and Fairlane custom car radios to be made at a serious out-of-pocket loss (Appellants' R.A. 64, 65, 66, 135*).

*These are references to affidavits of plaintiffs' president. The quoted statements are otherwise unsupported by the record.

Moreover, they incur severe injury to their good will and reputation as suppliers of a complete line of custom automobile radios for new cars (Appellants' RA 128, 131, 138)."

Ford does not offer the models mentioned "in two versions". None of these models has "an imperforate dashboard that will not accommodate a custom radio". It is not necessary "to have radio dashboards manufactured for them". (DPRA 106.) In addition to the radio and supporting parts, all that is necessary for its complete and attractive installation in any of these models is an ornamental plastic or metal cover for the dashboard (which is more accurately called an "instrument panel"). This cover is either an ornamental mask and lens or an ornamental finish panel.

Ford makes these cover panels available at the following prices — $6.05 for Ford cars, $5.00 for Fairlane cars, and $7.67 for Comet and Mercury cars. (DPRA 113.) As plaintiffs' distributors have sold radios for these cars at prices substantially less than defendant charges for its radios (DPRA 75, 80, 82, 84, 88, 149, 152, 154, 158, 164), dealers can purchase plaintiffs' radio and defendant's cover plate and still pay less than if they purchase the radio from defendant. Dealers generally charge customers the same price for plaintiffs' radio as for defendant's. (Opinion of Court of Appeals, Appendix to Petition, p. 18a; DPRA 149, 152, 155, 159, 162, 166, 170, 172, 182, 184-185, 194, 196, 200, 205.)

One of the principal reasons why some Ford dealers have ceased purchasing or reduced their purchases of plaintiffs' radios is, as found by Judge Garrity, "probably the current shortage of trained mechanics and service stalls and dealers' consequent preference for factory-installed equipment". (Appendix to Petition, p. 11a; see

DPRA 140-141.) It appears that the reasons why some Ford dealers have purchased fewer of plaintiffs' radios than before are dissatisfaction with them and their customers' complaints after finding that the radios were not defendant's and that defendant's warranty does not apply to them. (DPRA 82, 98, 101, 151, 156, 158, 169, 178, 184, 186, 187, 201, 202.)

Both Judge Caffrey and Judge Garrity found that plaintiffs had failed to establish that their declining sales were due to the changes in the covers of the instrument panels. Thus Judge Caffrey found that there was "no significant causal relationship between the interior changes in the Galaxies and Fairlanes and the increased percentage of cars being sold . . . with factory-installed radios . . . ." (PPRA 50.)

Similarly, Judge Garrity found that plaintiffs "presented virtually no proof to connect [their] losses with conduct of the defendant" (Petition, Appendix B, p. 11a) and that "plaintiffs have thus far failed to establish a causal relationship between the dashboard change and plaintiffs' declining sales". (*Ibid.*)

Although there is evidence that plaintiffs' sales of radios for Ford cars (like their sales of radios for cars of other manufacturers) have decreased in recent years, it is clear that Ford dealers still buy substantial quantities of radios other than Ford radios for Ford made cars. (PPRA 117, DPRA 148-205.) Plaintiffs' brief makes no reference to the fact, established by affidavits of numerous Ford dealers, that the decrease in their purchases of plaintiffs' radios was due to other factors, such as complaints about and the inferior quality of Automatic radios, difficulty in having repairs made on them, etc. (See, for example, DPRA 153, 156, 158, 169.) These Ford dealers were all named by plaintiffs themselves as those whom they thought would be most likely to state that the decrease in their purchases was

due to changes in the instrument panels. (DXRA 115-116, 154-155.)

The delay of plaintiffs in getting their radios on the market is attributed by them to difficulties in retooling and procuring the parts made necessary by the instrument panel changes. But the plaintiffs admit that they have never attempted to obtain the necessary parts for the 1967 Mercury or Deluxe Comet (DXRA 117-118), and plaintiffs' officer in charge of sales has admitted that changes by automobile manufacturers in the design of their radios and instrument panels are common in the industry, and that such changes in design have often delayed plaintiffs in getting their custom radios on the market even for car lines employing the so-called "knockout" type of radio cover plate. (DXRA 139, 142-146.)

Moreover, it appears that plaintiffs have had a loss on radios for Ford cars in every year for which they have provided information, including the year ending September 30, 1964, *before any changes in the covers for the instrument panels.*

Combining the "profit on sales" experienced by Automatic Radio Sales, Inc. (DPRA 123) with the "loss on Ford operations" shown by the manufacturing company (DPRA 127) results in a consolidated figure shown an overall loss of $16,049 for the year ending September 30, 1964, for the total Ford line of plaintiffs' radios. This fiscal year ended about the time when the changes in the instrument panels complained of by plaintiffs first occurred. In that fiscal year, plaintiffs had an overall loss (combining the two companies) of $25,809 on sales of their Ford ("Galaxie") radios for defendant's cars with the conventional "knock out plates". (DPRA 123 and 127 combined.)

Furthermore, by combining the figures for the two plaintiff companies, we find that on their radios for Mercury

cars they had an overall loss of $1,577 in the fiscal year ending September 30, 1964 (DPRA 123 and 127 combined); $43,072 in the fiscal year ending September 30, 1965 (DPRA 124 and 128 combined); and $18,610 in the fiscal year ending September 30, 1966 (DPRA 125 and 129 combined), all of which preceded the panel changes in that car. They have experienced no loss on Mercury radios in 1967, after the panel changes, since they have not sold radios this year for that car! (DPRA 130.)

That there is virtually no relation between plaintiffs' alleged losses on the sales of their radios for defendant's cars and the instrument panel changes is indicated by the fact that on their sales of radios for Comet, the combined result for the two plaintiffs for the fiscal year ending September 30, 1964 was a profit of $4,216 (DPRA 123 and 127 combined), and in the next fiscal year a loss of $40,106 (DPRA 125 and 129 combined). (The change in the instrument panel of the Comet was not made until their introduction of the 1967 model in September, 1966. In the first half of the fiscal year beginning October 1, 1966, the combined loss of the plaintiffs on their sales for Comets was $19,409. (DPRA 126 and 130 combined.)

Defendant's Mustang has always had and continues to have a "knock out plate" type of instrument panel. Yet plaintiffs have suffered an overall loss in their combined sales of their radios for this model in each year for which they provide figures (beginning with the fiscal year ending September 30, 1964). (DPRA 123 and 127 combined, 124 and 128 combined, 125 and 129 combined, 126 and 130 combined.)

Similarly, on radios for defendant's Falcon, which has always employed a "knock out plate", plaintiffs have sold their radios at an overall loss in every fiscal year except 1964, when they made an overall profit of $6,661. (*Ibid.*)

Cougar is a new car introduced by defendant in September, 1966. It employs a conventional "knock out plate". Yet for radios for this model in the first half of the 1967 fiscal year plaintiffs had an overall loss of $13,435. (DPRA 126 and 130 combined.)

That plaintiffs' alleged difficulty in making a profit on their Ford radios cannot be attributed to the instrument panel changes is indicated by the following facts.

The unit costs of tooling and of making the parts for plaintiffs' radios, per radio, must of necessity increase as the number of units manufactured decreases. Plaintiffs have experienced an across-the-board decrease in their sales of car radios which has no significant relation to the instrument panel changes. Their sales of car radios appear to have decreased substantially for most models, regardless of whether any change was made in the instrument panels of those models. Plaintiffs' sales of radios for Mercury decreased from 2,112 in January-March 1965 to 954 in January-March 1966, although the change in the instrument panel did not occur until September, 1966. Their sales of radios for Falcon decreased from 6,822 in January-March 1964, to 651 in January-March 1967, even though this model still employs the "conventional knock out plate" instrument panel. (PPRA 117.)

There has been a similar decrease in plaintiffs' sales of radios for cars of other manufacturers. The total number of radios sold by plaintiffs for defendant's cars decreased in the first half of model year 1967 to 21,581 units from 39,723 units in the first half of 1966, and plaintiffs' sales of radios for General Motors cars decreased to 28,552 units from 36,934 units, for Chrysler cars to 27,420 units from 49,176 units and for American Motors cars to 1,754 units from 2,913 units. (DXRA 120.)

The Petition contains the following statements (p. 3):

"While petitioners sell custom car radios to dealers franchised by each of the automobile manufacturers, Ford dealers are petitioners' largest single market and constitute their only significant market for their most important group of products, i.e. radios designed and adapted for custom installation in the Ford line of cars".

This is misleading. Petitioners do not sell directly to Ford dealers. Their customers are independent distributors. (DXRA 1.) These distributors also sell products other than those of petitioners, and many hundreds of them do not even deal in custom radios. Moreover, petitioners manufacture and sell to their distributors many products other than Ford radios — not only radios for Chrysler, General Motor and American Motors cars, but also other types of radios and other products, such as tractor radios, portable radios, air conditioners, power brakes, ignition systems, stereo tape players and reverb speakers. (DXRA 129-130.)

There is no evidence that plaintiffs lost a single distributor on account of anything which defendant has done, and as said by Judge Garrity "the over-all business of the plaintiffs is prospering. While they have lost some distributors during the past two years, they have replaced them and added new ones so that the total number of their distributors has increased." (Appendix B to Petition, p. 12a; see DXRA 108-114.)

---

The Petition contains the following statement (pp. 12-13):

"In the opinion of the First Circuit in the present case, no question is raised as to the legal sufficiency of the charges made in petitioners' complaint or as to the adequacy of the evidence of antitrust violation in the affidavits and other documentary evidence submitted by petitioners in the district court."

This not so. The opinion of the Court of Appeals contains the following statement:

> ". . . the allegations and affidavits are not such as to convince us of such a strong probability of success on the merits that we should apply a less stringent requirement of proof of irreparable injury." (P. 18a of Appendix B to the Petition.)

Note also the following extracts from the opinion of Judge Garrity:

> ". . . plaintiffs have not established by evidence offered on the pending motion (a) that the defendant's marketing practice of supplying imperforate dashboards unless radios have been factory-installed is equivalent to an illegal tying arrangement, this being an unresolved question which must be more fully developed both factually and legally at the trial . . ." (P. 13a of Appendix B to Petition.)

In 1965, Judge Caffrey ruled that "the evidence which plaintiffs have adduced at this hearing does not lay a sufficient predicate for any finding that Ford may have violated Section 2 of the Sherman Act". (PPRA 52.) This is still true today.

---

There is no finding in any of the three opinions of the courts below to support the assertion in the Petition (p. 2) that defendant's practices "are giving the defendant a complete, unchallenged monopoly" in the market for radios for Ford cars. The assertion is erroneous argument and not a statement of fact. See Redd's affidavit (DPRA 234-235).

The Petition asserts (p. 13) that "the uncontested facts of Ford's increase in radio sales with the adoption of new dashboard marketing practices and of petitioners' decline in sales are themselves the clear evidence of causation", and it goes on to argue that a jury could conclude that "defendant's wrongful acts" caused damage to plaintiffs.

This statement, however, overlooks the conclusions of the Court of Appeals quoted on pp. 6-7, *supra,* and the conclusion of Judge Garrity quoted on p. 5, *supra.*

Note also the conclusion of Judge Caffrey that there was "no significant causal relationship between the interior changes in the Galaxies and Fairlanes and the increased percentage of cars being sold . . . with factory-installed radios". (PPRA 50.) Judge Caffrey found that "the percentage of factory-installation of car radios in the 1965 models through March 31 of this year has increased in very many, if not all, of the major makes of automobiles which are delivered equipped with the conventional knockout plate". (*Ibid.*) He then went on to compare the increase in factory-installation rates in various models of cars employing the conventional instrument panels with those in the Ford and Fairlane, and found them to be comparable. (*Ibid.*)

The radio cover plates complained of were the product of Ford stylists and were decided upon in order to improve the appearance and quality of the panels and in the case of some cars to save costs as well. (DPRA 206-215.)